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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1348

J. M. FIELDS, INC.,

Petitioner,

—VS.—

PETER J. BRENNAN, Secretary of Labor,
United States Department of Labor,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

PAGE

Opinions Below 1

Jurisdictional Statement 2

Questions Presented 2

Constitutional and Statutory Provisions Involved 4

Statement of the Case 5

A. The Scope of Injunctive Relief 6

B. Wilful Violation 9

C. The Burden of Proof 9

REASONS FOR GRANTING THE WRIT:

I. The Fifth Circuit's Opinion Is in Direct Conflict on the Same Points of Law With the Opinions of This Court and of Other Courts of Appeals 11

A. The Opinion Approving a Chain-Wide Injunction Is in Direct Conflict with *NLRB* v. *Express Publishing Co.*, 312 U.S. 426 (1941); *Hodgson* v. *Corning Glass Works*, 474 F.2d 226 (2nd Cir. 1973); and with *Hodgson* v. *American Can Co.*, 440 F.2d 916 (8th Cir. 1971) 11

1. Introduction—The Issue Defined 11

2. Irreconcilable Conflict With This Court and Between the Circuits 12

PAGE

3. The Fifth Circuit's View Is Legally and Factually Untenable 13

(a) No Policy That Fosters or Condones Discrimination 13

(b) The Establishment by Establishment Criterion Disregarded 13

(c) The "Job-by-Job" Criterion Disregarded 15

4. Irreparable Damage to Fields and All Other Retail Chain Organizations 17

B. The Opinion Finding That the Secretary Had Sustained His Burden of Proof as to Equal Skill, But Remanding the Case to the District Court for Additional Findings as to Equal Effort and Responsibility, Is in Direct Conflict on the Question of Burden of Proof With *Schultz* v. *Wheaton Glass Co.*, 421 F.2d 259 (3rd Cir. 1970); *Schultz* v. *American Can Co.*, 424 F.2d 356 (8th Cir. 1970); and *Hodgson* v. *Corning Glass Works*, 474 F.2d 226 (2nd Cir. 1973) 19

1. The Court of Appeals Actually Found That the Secretary Had Not Demonstrated Substantial Equality 19

2. The Court of Appeals Impermissibly Relieves the Secretary of the Burden of Demonstrating Substantial Equality and Imposes Upon the Employer the Burden of Demonstrating the Absence Thereof 20

PAGE

II. The Fifth Circuit's *per Se* Approach to Violations and Broad Injunctive Relief Against Multi-Establishment Employers Under the Equal Pay Act Determines an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by the Supreme Court 21

A. Introduction—The Issue Defined 21

B. Misapplication of, and Inappropriate Reliance Upon, Jiffy June Farms 22

C. Application of Jiffy June Farms Has Materially Prejudiced Fields, and Will Similarly Prejudice All Other Retail Chains, by Impermissibly Infringing Upon Basic Due Process Guarantees 24

1. Deprivation of the Two-Year Statute of Limitations 24

2. Summarily Subject to Contempt Sanctions 24

D. The "Administrative Necessity" Test Is Not Warranted by the Within Circumstances and Unconstitutionally Prevents Fields, as It Will Likewise Prevent Other Chain Store Retailers, From Defending Against Future Alleged Violations 27

CONCLUSION 28

Certificate of Service 29

PAGE

APPENDIX:

Judgment of the U. S. Court of Appeals, Fifth Circuit 1a

Opinion of the U. S. Court of Appeals, Fifth Circuit 3a

U. S. Court of Appeals Modification on Rehearing 19a

Judgment of the U. S. District Court, Middle District of Florida 21a

Findings of Fact and Conclusions of Law 26a

Excerpts From the Minutes 37a

Defendant's Exhibit 11 ..... 50a

Defendant's Exhibit 12 ..... 51a

Defendant's Exhibit 17 ..... 52a

AUTHORITIES CITED

Cases:

Baumgartner v. *United States*, 322 U.S. 665 (1944) 10

Beneficial Finance Co. v. *Wirtz*, 346 F.2d 340 (7th Cir. 1965) 14

Brennan v. *General Motors Acceptance Corp.*, 482 F.2d 825, 828 (5th Cir. 1973) .....15, fn. 23

Coleman v. *Jiffy June Farms, Inc.*, 458 F.2d 1139 (5th Cir. 1970) 9, 22

FTC v. *Henry Broch & Co.*, 368 U.S. 360 (1962) 12

Goldberg v. *Cockrell d/b/a Cockrell Banana Co.*, 303 F.2d 811 (5th Cir. 1962) 21

PAGE

Hodgson v. *American Can Co.*, 440 F.2d 916 (8th Cir. 1971) 13
Hodgson v. *Corning Glass Works*, 474 F.2d 226 (2nd Cir. 1973) 11, 19, 20
Hodgson v. *Fairmont Supply Co.*, 454 F.2d 490 (4th Cir. 1972) 15
Hodgson v. *First Federal Savings & Loan Assn.*, 455 F.2d 818 (5th Cir. 1972) 8, 16
Hodgson v. *Golden Isles Nursing Home, Inc.*, 468 F.2d 1256 (5th Cir. 1972) 8, 15, 27
Hodgson v. *Hotard*, 436 F.2d 1110, 1115 (5th Cir. 1971) 26
Hodgson v. *Parke d/b/a Southwestern Guard Service*, 413 F.2d 1364 (5th Cir. 1969), on remand 324 F. Supp. 1297 (S.D. Tex. 1971) 14
Hodgson v. *Robert Hall Clothes, Inc.*, 326 F. Supp. 1264 (D.C. Del. 1971), 473 F.2d 589 (3rd Cir. 1973) 15, 18
Home News Publishing Co. v. *United States*, 329 F.2d 191 (5th Cir. 1964) 25

Idaho Sheet Metal Works v. *Wirtz*, 383 U.S. 190 (1966) 14

McComb v. *Jacksonville Paper Company*, 336 U.S. 187, 193 (1949) ..... fn. 13, 25
Mitchell v. *Ballenger Paving Co.*, 299 F.2d 297 (5th Cir. 1962), cert. denied, 370 U.S. 922 (1962) 21
Mitchell v *Pidcock d/b/a Pidcock Tobacco Warehouses*, 299 F.2d 281 (5th Cir. 1962) 21

NLRB v. *Express Publishing Co.*, 312 U.S. 426 (1941) 11, 12

PAGE

Schultz v. *American Can Co.*, 424 F.2d 356 (8th Cir. 1970) 19, 20

Schultz v. *First Victoria National Bank*, 420 F.2d 648 (5th Cir. 1969) 15

Schultz v. *Wheaton Glass Co.*, 421 F.2d 259 (3rd Cir. 1970) 19, 20

United States v. *American Trucking Assns.*, 310 U.S. 534, 549 (1940) 14

United States v. *W. T. Grant Co.*, 345 U.S. 629, 633 (1953) ..... fn. 13, 25

United States v. *Yellow Cab Company*, 338 U.S. 338 (1949) 10

Wirtz v. *Atlas Roofing Manufacturing Co.*, 377 F.2d 112, 116 (5th Cir. 1967) ..... fn. 13, 14, 21

Statutes:

Section 16(a) of the FLSA 26

Portal-to-Portal Act of 1947, 29 U.S.C.A. §255(a) 23

Rule 52(a) *Federal Rules of Civil Procedure* 10

The Age Discrimination In Employment Act, 29 U.S.C. §621, et seq. ..... fn. 8

29 C.F.R. §779.304 14

29 C.F.R. §800.103 14

29 C.F.R. §800.104 (1967) 14

29 C.F.R. §800.122 15

29 U.S.C., §206(d)(1) 14

29 U.S.C. §621 16

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J. M. FIELDS, INC.,

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PETER J. BRENNAN, Secretary of Labor,
United States Department of Labor,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

J. M. FIELDS, INC., hereinafter referred to as "Fields", petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause on November 16, 1973, as modified on rehearing January 17, 1974. Respondent Secretary of Labor is hereinafter referred to as "the secretary".

Opinions Below

Included in the Appendix hereto are copies of the opinion (A. 3a) and judgment (A. 1a) of the United States Court of Appeals for the Fifth Circuit rendered November 16, 1973 (Case No. 72-1066); the Court's modification thereof on rehearing rendered January 17, 1974 (A. 19a); the judg-

ment (A. 21a) of the United States District Court for the Middle District of Florida; and the District Court's Findings of Fact (A. 26a) and Conclusions of Law (A. 31a).

Jurisdictional Statement

Proceedings were initiated by the Secretary of Labor, United States Department of Labor, in the United States District Court for the Middle District of Florida. Jurisdiction was based on the Fair Labor Standards Act of 1938, 29 U.S.C., §217.

Fields appealed to the United States District Court of Appeals for the Fifth Circuit which rendered its opinion and judgment on November 16, 1973 (A. 1a to 18a). An order on petition for rehearing was rendered by that Court on January 17, 1974 (A. 19a).

Jurisdiction in this Court is based upon The Judicial Code, 28 U.S.C. §1254(1), and Rule 19, 1(b) Rules of the Supreme Court of the United States.

Questions Presented

Fields seeks review before this Court of a decision involving momentous questions of first impression in the construction of a significant statute, the Equal Pay Act of 1963, 29 U.S.C., Section 206 (d) (1). The Courts of Appeal in two circuits have previously reached opposing results as to the same issues and this position and interpretation of this statute affects not only Fields but substantial business interests of all regional and national retail chain stores.

The result of these conflicting judicial standards for enforcement of the Equal Pay Act is to create unreasonable and oppressive judicial standards which differ in the different judicial circuits where Fields operates its business enterprises.

1. Whether the scope of injunctive relief for violation of Section 6(d)(1) of the Fair Labor Standards Act of 1938, as amended (Equal Pay Act of 1963), may lawfully extend beyond those isolated establishments found to be the sites of violations to include other commonly-owned establishments where no discrimination in wages, solely on account of sex, was alleged or found, and where there has been no showing of any policy of such discrimination?

2. Whether the scope of injunctive relief for violation of Section 6(d)(1) of the Fair Labor Standards Act of 1938, as amended (Equal Pay Act of 1963), may lawfully extend beyond the single employment classification in those isolated establishments wherein violations were alleged and found, to include all employment classifications in every other commonly-owned establishment, although violations in such other establishments and classifications were neither alleged or found and where there has been no showing of any *policy* of discrimination?

3. Whether an employer's mere knowledge of the existence of the Fair Labor Standards Act of 1938, as amended, is lawfully sufficient as the sole and exclusive predicate for a judicial finding that his violation of the Act was wilful for purposes of application of the limitation on actions provision of the Portal-to-Portal Act of 1947?

4. Whether injunctive relief for an alleged violation of Section 6(d)(1) of the Fair Labor Standards Act of 1938, as amended (Equal Pay Act of 1963), may lawfully issue:

(a) Where the Secretary has not carried the burden of demonstrating substantial equality between jobs, and has therefore failed to prove the asserted violations, existence of which is a condition precedent to the injunctive relief; and

(b) Where the Secretary has been judicially relieved of carrying the aforesaid burden, fails to demonstrate the presence of substantial equality and the employer, after having had the burden of proof shifted to him, assertedly fails to prove the absence of substantial equality.

Constitutional and Statutory Provisions Involved

The Equal Pay Act of 1963, 29 U.S.C., §206(d)(1) provides:

> (d) (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who

> is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

Statement of the Case

The District Court found that Fields had committed nonwilful violations of the EPA in the single job category of area supervisors in three separate establishments in one State out of its then sixty-six retail store chain, located in fifteen other States. Fields was enjoined from future violations in any and all job classifications in all of its stores, and was ordered to make payment of back wages to eighteen employees[1] (A. 22a).

Fields appealed and questioned whether a nationwide injunction for a violation of the EPA was lawful in light of the record of isolated violations at three stores, and in view of the EPA's "establishment" and job by job criteria.[2]

The Secretary cross-appealed and argued that the District Court erroneously had found a difference in skill, effort and responsibility between men and women "area supervisors" who were responsible for selling "hardline"

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[1] Section 206(d)(3) provides that amounts owing to employees as a result of violations of the EPA are denominated "unpaid minimum wages or unpaid overtime compensation."

[2] Section 206(d)(1) relates an employer's equal pay obligation to employees at a particular establishment.

and "softline" merchandise. Also, that the District Court erroneously had found that Fields' violations were not wilful for the purpose of applying the three-year statute of limitations prescribed by Section 6 of the Portal-to-Portal Act of 1947. 29 U.S.C., §255(a).

A. *The Scope of Injunctive Relief.*

The Secretary claimed EPA violations only at Fields' three stores in Tallahassee, Eau Gallie and Merritt Island, Florida in the single job classification of area supervisors. The Court of Appeals concedes that proof was limited thereto.

The Court of Appeals' opinion sustaining chain-wide injunctive relief rested not upon finding a policy of discrimination, but exclusively upon a finding, unsupported by the record, that Fields' employment practices were centrally administered by regional and home-office personnel directors. The unrebutted proof was that the company policy, from June, 1965, made local store managers responsible for initial recruiting, interviewing, selecting and hiring their own Area Supervisors.[3] Store managers also had primary responsibility for supervisory appraisal of Area Supervisors' work,[4] and pay increases were determined by store operations supervisors rather than by Fields' industrial relations staff.

Fields' industrial relations staff included regional personnel directors and a vice president for industrial relations. Its duties were to recruit store management; super-

[3] Simmons (A. 37a); Renshaw (A. 38a); Henry (A. 39a to 41a); Salter (A. 42a to 44a).

[4] Simmons (A. 45a to 47a).

vise payroll administration; supervise compliance with the FLSA and other employment practices laws; conduct training activities for management candidates, and act in an advisory capacity to store operations personnel.[5]

The Court of Appeals' finding that all wage increases were subject to approval by either the regional personnel director or the home office (A. 17a) was contrary to and irreconcilable with the only evidence on the subject: namely, that wage increases were approved "in the field," and were reviewed by the industrial relations staff, only to ascertain compliance with total payroll budget.

Nevertheless, the Court of Appeals held the District Court had not abused its discretion in granting chain-wide injunctive relief, and affirmed the judgment to that extent.

Apart and aside from the question of significant central control was the issue of administrative necessity. On that ground, too, the Court affirmed the chain-wide injunction and held:

> It would frustrate the broad purposes of the FLSA in suits involving large corporate defendants with extensive branch operations to require the Secretary to investigate and prove violations in all or substantially all of the defendant's branches to justify the issuance of a chain-wide injunction. Considerations of administrative necessity are persuasive as warranting the chain-wide injunction issued below.

The Court then found the injunction impermissively broad because its terms applied not only to the single class of employees (Area Supervisors) involved in the action but as well to all Fields' employees, regardless of job

[5] Simmons (A. 45a to 46a); Walker (A. 48a to 49a).

classification. Since there was no claim or proof of discrimination affecting other job categories, the Court modified the injunction to limit its applicability to Area Supervisors.

The Secretary filed an alternative motion to strike from the opinion that portion which limited the scope of the injunction to Area Supervisors, or for a rehearing. He contended that the limitation created a conflict with *Hodgson* v. *First Federal Savings and Loan Assn.*, 455 F.2d 818 (5th Cir. 1972), wherein the Court of Appeals refused to limit injunctive relief for age discrimination to the particular job category in which the violation occurred.[6]

Fields replied[7] that the alleged violation concerned only Area Supervisors; that the proof was limited to that one job category in the three Florida stores; and that to grant so broad an injunction would create a presumption of wrongdoing and undercut any future defense Fields might otherwise assert concerning different employment classifications. The *Savings and Loan* case *(supra)*, was easily distinguished, Fields emphasizing that the Secretary's proposal contradicted *Hodgson* v. *Golden Isles Nursing Home, Inc.*, 468 F.2d 1256 (5th Cir. 1972).

The Court treated the Secretary's alternative motion as a petition for rehearing, granted it, and deleted from its opinion language narrowing the injunction to include only Area Supervisors.

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[6] The Age Discrimination In Employment Act, 29 U.S.C., §621, *et seq.*, does not include the defenses available under the EPA, i.e., establishment by establishment and job by job.

[7] The Court requested a reply on this issue.

B. *Wilful Violation.*

The District Court found scattered instances of discrimination in the three Fields' stores—not wilful but the unintended result of hiring at the prevailing wage in the local market.[8]

The Court of Appeals' opinion concedes that the Fields' industrial relations staff pursued a positive action program designed to secure chain-wide compliance with the EPA, including periodic examination of store practices and personnel files with violations reported to the home office. It nevertheless reversed the District Court, holding that the test of wilfullness to be applied in cases concerned with civil liability for violations of the FLSA was that enunciated in *Coleman* v. *Jiffy June Farms, Inc.*, 458 F.2d 1139, 1142 (5th Cir. 1970): "Did the employer know that FLSA was in the picture?" The Court of Appeals discounted Fields' argument that the record, which showed isolated violations (at best), together with a cessation of violations prior to the trial, indicated—at most—*negligence and not wilfullness*, poor judgment perhaps, but not bad motive or wrongful intent.

C. *The Burden of Proof.*

The District Court found and concluded that the jobs of hardline and softline Area Supervisors entailed appreciably different degrees of skill, effort and responsibility—hence, the two jobs could not be compared for the purposes of the EPA.[9]

The Court of Appeals considered those Findings of Fact so conclusory in nature as to preclude the necessity of

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[8] Finding of Fact, number 21 (A. 31a).

[9] Findings of Fact, numbers 6, 7, 8 and 22 (A. 28a, 31a).

applying the "clearly erroneous" standard of Rule 52(a), *Federal Rules of Civil Procedure. Baumgartner* v. *United States,* 322 U. S. 665 (1944); *United States* v. *Yellow Cab Company,* 338 U. S. 338 (1949).

It then held that the Secretary had met the burden of showing "substantial equality" between hardline and softline Area Supervisors. But that required a threshold finding that the tripartite prerequisites to substantial equality between the jobs had been demonstrated by first proving substantial equality in skill, effort and responsibility. On that score, the Court (i) found no basic difference in responsibility; (ii) overturned the District Court's findings that more skill was required in the job of hardline, as opposed to softline Area Supervisors; and (iii) remanded for further findings as "to the comparative degrees of effort and responsibility" because "the findings of fact permit no conclusion with regard thereto (A. 12a to 13a).

The contradiction is apparent, the Circuit Court first holding the Secretary has met the burden of showing substantial equality but then remanding because, upon the record, *it cannot make a determination as to effort and responsibility—two of the three essential and indispensable elements* (skill, effort and responsibility) *necessary for the initial holding.*

REASONS FOR GRANTING THE WRIT

I.

The Fifth Circuit's Opinion Is in Direct Conflict on the Same Points of Law With the Opinions of This Court and of Other Courts of Appeals.

A. *The Opinion Approving a Chain-Wide Injunction Is in Direct Conflict With* NLRB v. Express Publishing Co., *312 U.S. 426 (1941)*; Hodgson v. Corning Glass Works, *474 F.2d 226 (2nd Cir. 1973)*; *and with* Hodgson v. American Can Co., *440 F.2d 916 (8th Cir. 1971)*.

1. Introduction—The Issue Defined.

The Court of Appeals' opinion concedes that the Secretary neither alleged nor established violations of the EPA at any of Fields' sixty-six facilities other than the three Florida stores directly involved in the action. Nor has issue been taken with the District Court's finding that the violations were not as widespread within the three stores as had been alleged.[10] Nevertheless, the Court of Appeals held that it would frustrate the broad purposes of the FLSA in suits involving large corporate defendants, with extensive branch operations, to require the Secretary to investigate and prove violations in substantially all of Fields' branches to justify the issuance of a chain-wide injunction; that considerations of administrative necessity were persuasive in warranting such broad injunctive relief. The Court's conclusion in this regard is in direct conflict

[10] The District Judge found no violations of the EPA between men and women area supervisors in the softline departments at two of the three stores. Findings 16 and 20, Findings of Fact (A. 30a to 31a).

on the same point of law with opinions of the Second and Eighth Circuits and with this Court.

2. Irreconcilable Conflict With This Court and Between the Circuits.

This Court, on numerous occasions, has condemned the issuance of broad injunctions either phrased in the language of the statute or which enjoins future violations unlike or unrelated to that charged. *NLRB* v. *Express Publishing Co.*, 312 U. S. 426 (1941); *FTC* v. *Henry Broch & Co.*, 368 U. S. 360 (1962). Under the same factual circumstances, the Second Circuit denied the Secretary's request for a company-wide injunction against twenty-six branch plants of the Corning Glass Works, where violations were proven at only three factories and one plant at Corning, New York. *Hodgson* v. *Corning Glass Works, supra*:

> ". . . Corning had been endeavoring since 1966—sincerely, if ineffectively—to bring, itself into compliance. There was no evidence of widespread violations of the Act, either at the Corning plants or its 26 branch plants nation-wide. . . . Yet so broad an injunction put Corning under threat of contempt for any alleged violation of the Equal Pay Act in respect of any category of employee in all but one of Corning's many plants.
>
> We agree with the point made by the Eighth Circuit in another Equal Pay Act case *Hodgson* v. *American Can Co.*, 440 F.2d 916, 921 (8th Cir. 1971), that absent a showing of a policy of discrimination which extends beyond the plants at issue here, there is no basis for a nation-wide injunction. . . ." *Corning Glass Works, supra* at 236.

In *American Can*, company wide injunctive relief embracing several plants was denied because the Secretary

did not prove Equal Pay Act violations at more than one plant. *Hodgson* v. *American Can Co.*, 440 F.2d 916, 921 (8th Cir. 1971).

3. The Fifth Circuit's View Is Legally and Factually Untenable.

We respectfully submit that the Fifth Circuit's opinion is untenable in at least three respects:

(a) *No Policy That Fosters or Condones Discrimination*

The Court reached beyond the proof and assumed (without finding) a proclivity on Fields' part to violate the EPA, as well as a policy that fostered unlawful discrimination, however unwittingly.[11] In fact, as in *American Can*, not only was there no showing of a policy of discrimination, but the opinion itself concedes that Fields endeavored to bring itself into compliance, as did the employer in *Corning Glass*.

(b) *The Establishment by Establishment Criterion Disregarded*

The opinion overlooks the unique *establishment by establishment* criterion expressed in the EPA.

Unlike the minimum wage and overtime restrictions of the FLSA, which does not distinguish between practices

[11] In *Wirtz* v. *Atlas Roofing Manufacturing Co.*, 377 F.2d 112, 116 (5th Cir. 1967) the court determined prospective injunctive relief by considering the employer's previous acts of non-compliance, and the need to insure future compliance. This comported with *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633 (1953) (injunctions should be limited to the extent necessary to insure future compliance with FLSA). Also see *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949) to the effect that broad prospective injunctive relief is appropriate on a showing of a "proclivity for unlawful conduct" or a "record of continuing and persistent violations of the Act", neither of which was present here.

at an employer's separate facilities, the EPA prohibits discriminatory pay practices "within any establishment in which such employees are employed." [12] The unique "establishment" feature of the Act has been confirmed by an interpretative regulation of the Wage-Hour Administrator.[13] Although the EPA does not define the term "establishment", the Administrator construes it to have the same meaning it has in Section 213(a)(2) and elsewhere in the FLSA. 29 C.F.R., §800.103. As used therein, "establishment" means a single "unit store." 29 C.F.R., §779.304. The Administrator's interpretative regulations receive substantial weight in construing the FLSA. *United States* v. *American Trucking Assns.*, 310 U.S. 534, 549 (1940); *Idaho Sheet Metal Works* v. *Wirtz*, 383 U.S. 190-205 (1966).

Thus, absent a finding that a discriminatory pay practice exists at each of a nationwide employer's separate establishments,[14] or that an employer has a history of violations,[15] or that an employer's policies foster discrimina-

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[12] 29 U.S.C., §206(d)(1).

[13] " . . . It is clear from the language of the Act that in each distinct physical place of business where employees of any employer work . . . , *the obligations of the equal pay requirement must be determined separately with reference to those of his employes who are employed in that particular establishment.* Accordingly, *where there are a number of distinct physical places of business in which an employer's employees are employed, compliance* with the equal pay provisions *must be tested within each establishment* for any workweek by comparing the jobs and pay of those only of his employees who are employed there during that workweek." 29 C.F.R., §800.104 (1967); 32 F.R. 2378 (Emphasis supplied).

[14] Cf. *Beneficial Finance Co.* v. *Wirtz*, 346 F.2d 340 (7th Cir. 1965).

[15] *Wirtz* v. *Atlas Roofing Manufacturing Co., supra; Hodgson* v. *Parke d/b/a Southwestern Guard Service*, 413 F. 2d 1364, 1368 (5th Cir. 1969), on remand 324 F. Supp. 1297 (SD Tex. 1971).

tion,[16] an injunctive order will be restricted to those establishments where violations have been found—as was done in *Corning Glass* and *American Can* (*supra*).[17]

(c) *The "Job-by-Job" Criterion Disregarded*

The opinion further overlooks the need to judge asserted violations, and to fashion an injunction, on a job-by-job basis.

The payment of different rates to males and females, though they work in the same establishment, does not constitute a *per se* violation of the Act. To prove a violation, the Secretary must show that the lower-paid employees are performing equal work on jobs, the performance of which requires "substantially equal" skill, effort and responsibility, and which are performed under similar working conditions. *Hodgson* v. *Fairmont Supply Co.*, 454 F. 2d 490, 493 (4th Cir. 1972).[18]

Thus, in *Hodgson* v. *Golden Isles Nursing Home, Inc.*, 468 F. 2d 1256, 1258 (5th Cir. 1972), the Fifth Circuit rejected the Secretary's request for a conclusive determination that in all hospitals and nursing homes across the country, aides and orderlies perform equal work:

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[16] *Shultz* v. *First Victoria National Bank*, 420 F. 2d 648 (5th Cir. 1969); *Brennan* v. *General Motors Acceptance Corp.*, 482 F. 2d 825 (5th Cir. 1973).

[17] The individual store in a retail chain is an "establishment" for the purposes of the EPA. *Hodgson* v. *Robert Hall Clothes, Inc.*, 326 F. Supp. 1264 (D.C. Del. 1971), 473 F.2d 589 (3rd Cir. 1973).

[18] As construed by the Wage-Hour Administrator, the term "equal skill, effort and responsibility" refers to three separate tests, each of which must be met in order for the equal pay standard to apply. 29 C.F.R., §800.122.

> "The differences or similarities in each case must determine the ultimate outcome under the Equal Pay Act . . . (the legislative history of the Act) underscores the necessity of case-by-case analysis. By substituting the term 'equal work' for 'comparable work', which was originally suggested, Congress manifested its intent to narrow the applicability of the Act." *Id.*, at 1258.

The order on rehearing, which refused to narrow the injunction to apply only to Area Supervisors, comports neither with the record, the EPA or with the Fifth Circuit's own *Golden Isles* opinion. The net effect is a judicial amendment to the EPA, excerpting the unequivocal individual job concept.

The Secretary's justification thereof rested upon the inapposite case of *Hodgson* v. *First Federal Savings & Loan Assn.*, 455 F. 2d 818 (5th Cir. 1972) where the employer was charged with a violation of the Age Discrimination In Employment Act.[19] One of the two issues therein was whether the scope of injunctive relief should include all of the employer's available job descriptions or just the job of "teller". The record was studded with proof of company-wide discrimination in favor of youth and against age *in all available jobs*. There was also some indication of sex discrimination.

There is a marked contrast between the record in *First Federal Savings & Loan* and the subject case. In the initial *Fields* opinion (November 16, 1973), the Fifth Circuit found that:

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[19] 29 U.S.C., §621, *et seq.* The Age Discrimination Act does not include either the "establishment" or individual job criteria of the EPA.

> There was no proof of discrimination in classes of employees other than Area Supervisors, and accordingly we direct that the terms of the injunction be modified to limit its applicability to this class of employees.

This comports with the record which no more supports injunctive relief against the entire chain of stores (now more than sixty-six), than it does with respect to commission salesmen, stockboys, cashiers, janitors, security guards, warehousemen, truck drivers, office clerks or merchandise buyers.

The unwarranted inclusion of these job categories within the scope of the injunctive relief elevates "administrative necessity" to the status of legislation at the expense of the fundamental right to substantive and procedural due process.

4. Irreparable Damage to Fields and All Other Retail Chain Organizations.

Because of the Fifth Circuit's opinion, Fields and other multi-establishment national employers, such as Sears-Roebuck Co., F. W. Woolworth, J. C. Penney Co. and Montgomery Ward, are now confronted with the certainty of being unable to defend on a job-by-job, establishment by establishment, basis against future charges of EPA violations. In practical terms, Fields was found to have violated the Act as to *all* employee job classifications even though no evidence was before the Court as to the nature of these jobs; thus, a future case involving cashiers or office clerks would not be defensible on grounds peculiar to those jobs. It bears repeating that the Fifth Circuit did not find anything in the record to support such a result. Moreover,

the express language of the EPA does not sanction anything other than a case-by-case analysis of the various jobs, as was explained in *Golden Isles (supra).*

We know from *Hodgson* v. *Robert Hall Clothes, Inc., supra* (footnote 17), that Congress intended that pay differentials could be lawfully justified by any factor other than sex, even though the jobs involved the same skill, effort and responsibility. *Id.,* at 595 (i.e., a particular job produces more revenue). Fields has been deprived of the opportunity to prove, as may be necessary in the future, that cashiers, office clerks, salesmen, and other employees perform jobs *inter se* that demand different pay for males and females due to a factor other than sex.

The inclusion of all jobs and all stores within the injunction makes all future violations wilful *per se,* and compels criminal penalties as a natural consequence.

There is no justification in the history of the Act or in its judicial interpretation for the translation of isolated violations affecting one-job category at three of sixty-six establishments into a presumption of such violations affecting all jobs in all of those establishments.

B. *The Opinion Finding That the Secretary Had Sustained His Burden of Proof as to Equal Skill, But Remanding the Case to the District Court for Additional Findings as to Equal Effort and Responsibility, Is in Direct Conflict on the Question of Burden of Proof With* Schultz v. Wheaton Glass Co., *421 F.2d 259 (3rd Cir. 1970)*; Schultz v. American Can Co., *424 F.2d 356 (8th Cir. 1970)*; *and* Hodgson v. Corning Glass Works, *474 F.2d 226 (2nd Cir. 1973).*

1. The Court of Appeals Actually Found That the Secretary Had Not Demonstrated Substantial Equality.

The above-cited cases hold that the Secretary has the burden of demonstrating "substantial equality" in skill, effort and responsibility as a condition precedent to a showing of substantial job equality. Substantial job equality, in turn, is a condition precedent to establishing a violation of the Act. Violation of the Act is a condition precedent to an injunction.

The Court of Appeals announced its agreement therewith (A. 10a), but as aforementioned (*supra*, p. 10) failed to follow through. Instead, the Court allowed the injunction to stand, thus necessarily finding that the Secretary had carried the burden, but remanded for further factual proofs on the question of effort and responsibility, thereby necessarily finding that the Secretary had not carried the burden.

This is more than a mere internal inconsistency. For, if as here, the Secretary has not demonstrated substantial equality in each requisite element (skill, effort and responsibility) it was a literal impossibility to hold, as the Court nonetheless did, that the jobs were substantially equal. Thus, said holding was unwarranted—judged not by counsel's ingenuity, but by the opinion of the Court itself—and it inexorably follows that the injunction was and is im-

proper as resting upon differences in wage scales not proved violative of the act.

Accordingly, the Court's opinion is in direct conflict with *Wheaton Glass Co., American Can Co.* and *Corning Glass Works* (*supra*).

2. The Court of Appeals Impermissibly Relieves the Secretary of the Burden of Demonstrating Substantial Equality and Imposes Upon the Employer the Burden of Demonstrating the Absence Thereof.

The Court's decision permits the injunction to stand, although, by virtue of the remand as to effort and responsibility, it must be that the Secretary failed to demonstrate substantial equality between the jobs. Thus, the necessary predicate to support an injunction is missing. The result is that there has been judicially engrafted onto the Act the proviso that the employer has the burden of demonstrating an absence of substantial equality; that the employer's failure to so demonstrate, even though the Secretary has not shown the presence thereof, warrants an injunction.

Such result is in patent disagreement with the concept of "innocent until proven guilty", is violative of basic due process guarantees, and cannot be reconciled with *Wheaton Glass Co., American Can Co.* and *Corning Glass Works* (*supra*).

II.

The Fifth Circuit's *per Se* Approach to Violations and Broad Injunctive Relief Against Multi-Establishment Employers Under the Equal Pay Act Determines an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by the Supreme Court.

A. *Introduction—The Issue Defined.*

The question of when and whether chain-wide injunctive relief is appropriate for enforcement of the EPA *vis-a-vis* a multi-facility employer should be determined by proof of actual violations, or by proof of a centrally administered policy which fosters or condones wage discrimination affecting all or substantially all job classifications and establishments.

A lesser standard would vitiate the unique "establishment" and individual job criteria as available defenses in the EPA.

Nevertheless, the Fifth Circuit has applied a lesser standard, thus vitiating the establishment and job criteria prerequisites, by relying upon the standards for injunctive relief heretofore granted under traditional FLSA coverage. Even then, it has bypassed its own guidelines for determining the need for broad injunctive relief,[20] and adopted instead the rule allowing a harsh remedy when *justified* by the circumstances of cases involving *wanton* traditional coverage violations.[21] Clearly the latter rule does not

[20] *Wirtz* v. *Atlas Roofing Manufacturing Co.*, 377 F.2d 112, 116 (5th Cir. 1967); *Mitchell* v. *Ballenger Paving Co.*, 299 F.2d 297 (5th Cir. 1962), cert. denied, 370 U. S. 922 (1962).

[21] *Goldberg* v. *Cockrell d/b/a Cockrell Banana Co.*, 303 F.2d 811 (5th Cir. 1962); *Mitchell* v. *Pidcock d/b/a Pidcock Tobacco Warehouses*, 299 F.2d 281 (5th Cir. 1962).

apply here since the Court did not find that Fields violated the Act at any but three of its then sixty-six stores, or that its policy was one that fostered or condoned unlawful discrimination in wages on account of sex.

We ask, as did the Fifth Circuit of the trial court, where in the opinion (or in the record) is there a factual finding of unlawful wage *policies* or of a centrally administered company-wide policy that fostered unlawful discrimination? There is no such finding. The opinion concedes that Fields diligently attempted to enforce compliance with the EPA, and the Court could not have concluded otherwise in view of the unrebutted proof that Fields instructed and enforced compliance with the EPA.[22]

B. *Misapplication of, and Inappropriate Reliance Upon, Jiffy June Farms.*[23]

In the absence of a finding of wrongful intent or a policy to discriminate, the Circuit Court necessarily had to predicate its finding of wilfulness upon some other ground. The Court seized upon the maxim of *Jiffy June Farms*—i.e.,

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[22] On May 18, 1964, Fields/Industrial Relations Division advised the store management that the EPA would become effective the next month (Defendant's Exhibit 11, A. 50a). On March 25, 1966, the Division again advised store managers not to hire male and female employees at dissimilar rates on the basis of sex. (Defendant's Exhibit 12, A. 51a). On April 25, 1968, the Division again advised store managers and others that persons "performing work requiring the same degree of skill and knowledge" should receive the same compensation (Defendant's Exhibit 17, A. 52a to 53a).

[23] *Coleman* v. *Jiffy June Farms, Inc.*, 458 F.2d 1139 (5th Cir. 1970) wherein the Fifth Circuit held:

> "Stated most simply, we think the test should be: Did the employer know the FLSA was in the picture?" *Id.*, at 1142.

to know the law and breach it, albeit inadvertently, is sufficient basis to support a finding of wilfulness.[24]

The *Jiffy June Farms* test of wilfulness must be read in conjunction with the Portal-to-Portal Act of 1947, 29 U.S. C.A., §255(a) which provides for a basic two-year statute:

> " . . . except that a cause of action arising out of a wilful violation may be commenced within three years after the cause of action accrued."

Jiffy June Farms emasculates the statutory distinction between wilful and non-wilful violations because, under its rule, every violation must be wilful and hence, subject to the three-year statute of limitations. This, because every employer subject to the Act presumably knows the "FLSA is in the picture."

Accordingly, unless the Congressional distinction between "wilful" and "non-wilful" is to be ignored, as *Jiffy June Farms* does, wilfulness must turn on intent. Intent is the essential element distinguishing the two types of violations.

Herein, at the District Court and the Court of Appeals level, no finding was made of a discriminatory *policy;* to the contrary, it was affirmatively demonstrated that Fields tried to bring itself into compliance. Absent such a policy, and in the face of proof positive that the isolated violations were, at worst, the result of negligence or poor judgment—but not wrongful motive—no basis existed to impugn Fields' intent.

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[24] In *Brennan* v. *General Motors Acceptance Corp.*, 482 F. 2d 825, 828 (5th Cir. 1973) the Fifth Circuit recognized that *Jiffy June's* holding on wilfulness was limited to the facts of that case, but found that GMAC had adopted a course of action which it knew could result in overtime violations.

In short, the Fifth Circuit did not find, nor could it have found, an intent to violate the EPA. Therefore, the alleged violations could not possibly have been wilful.

Jiffy June Farms, to the extent it abrogates the statutory distinction, should be disavowed.

C. *Application of Jiffy June Farms Has Materially Prejudiced Fields, and Will Similarly Prejudice All Other Retail Chains, by Impermissibly Infringing Upon Basic Due Process Guarantees.*

1. Deprivation of the Two-Year Statute of Limitations.

Application of the maxim complained of materially prejudices Fields, and the entire chain store industry, by depriving it of the two-year statute of limitations without *any* showing whatever of the requisite intent.

2. Summarily Subject to Contempt Sanctions.

There is, however, an even more severe hazard resulting from the Court's opinion that hangs like the Damocles' sword over Fields and the entire industry. The danger is pointed up in *Hodgson* v. *Corning Glass Works, supra.* The Second Circuit there recognized the employer's sincere but ineffective efforts to bring itself into compliance, and held that the absence of widespread violations of the Act precluded the type of broad (chain wide) injunction imposed here. The Court reasoned that such an injunction would "put *Corning* under threat of contempt for any alleged violation of the Equal Pay Act" with respect to all its employment classifications in all but one of its twenty-six plants. *Id.,* at 236.

The history of judicial enforcement of the FLSA does not necessitate or mandate the result reached by the Fifth Circuit but avoided in *Corning Glass.* The purposes of the

EPA are not penal in the first instance. Injunctions rendered for its enforcement are supposed to be remedial, not punitive. *McComb* v. *Jacksonville Paper Company,* 336 U.S. 187, 193 (1949); and *United States* v. *W. T. Grant Co.,* 345 U.S. 629, 633 (1953) in which this Court observed:

> "The purpose of an injunction is to prevent future violations . . . [and] . . . the moving party must satisfy the court that relief is needed . . . [because] . . . there exists some cognizable danger of recurrent violation, something more than the mere possibility of a future violation."

Although injunctive relief is characterized as remedial and not punitive, evidence of a pre-existing injunction is evidence of wilfulness. *Home News Publishing Co.* v. *United States,* 329 F. 2d 191 (5th Cir. 1964).

Because the within injunction is chain-wide a first violation in any store within the classification of Area Supervisor, and not merely in the three establishments involved, *ipso facto* makes out a case of wilfulness as being in contravention of the injunction, with attendant contempt sanctions. Furthermore, because the injunction covers *all* job classifications, a first violation in any store and in any classification, perceptively broadens the chance of *per se* wilfulness as being in contravention of the injunction, with attendant contempt sanctions.

Thus, the holding that Fields was guilty of a *per se* wilful violation, and thereby subject to a chain-wide injunction for a first violation, becomes the inexorable link to a criminal prosecution and possible civil contempt despite the "establishment" and individual job concepts of the EPA. The FLSA will impose a $10,000 fine on Fields and

its agents for a second violation,[25] and a civil contempt would lie upon a mere charge of a subsequent equal pay violation at any of its stores affecting any employee job classification. In *Hodgson* v. *Hotard,* 436 F.2d 1110, 1115 (5th Cir. 1971), the Court recognized that the employer charged with civil contempt has a "heavy burden" of showing that he cannot meet the demands of the Court which imposed the injunction.

These unfortunate results, necessitated by the Fifth Circuit's opinion, is manifestly without the contemplation of the EPA especially when, as here, the Secretary has neither contended nor proved that, in any of the now more than sixty-six stores, persons employed as commission salesmen, stockboys, cashiers, janitors, security guards, warehousemen, truck drivers, office clerks, merchandise buyers, or any other classifications, have been discriminated against in rates of pay within and/or between their job classifications.

We believe the Second Circuit's reasoning in *Corning Glass* (*supra*), with which the Fifth Circuit is at odds, to be eminently proper. It represents a positive balance between the legislative goal and the basic due process Fifth Amendment Rights absolutely precluding the type of "guilty until proven innocent" approach regretfully adopted by the Fifth Circuit.

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[25] Section 16(a) of the FLSA provides:

"Any person who *willfully* violates any of the provisions of Section 15 shall upon conviction thereof be subject to a fine of not more than $10,000 or to imprisonment for not more than six months, or both [sic]. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection." (Emphasis supplied).

D. *The "Administrative Necessity" Test Is Not Warranted by the Within Circumstances and Unconstitutionally Prevents Fields, as It Will Likewise Prevent Other Chain Store Retailers, From Defending Against Future Alleged Violations.*

It bears repeating that no finding was made of a policy of discrimination; that Fields endeavored to comply; that isolated violations were alleged and proved in only three establishments, in a single job classification; that the assumption of requisite central control is without foundation in the record; and that, even if there were sufficient central control, it would be of no moment unless there also were a policy of discrimination.

Nonetheless, the Fifth Circuit maintained that the chain-wide injunctive relief embracing every job category and classification was justified because "considerations of administrative necessity are persuasive as warranting the chain-wide injunction . . . " (A. 17a) Congress did not write considerations of "administrative necessity" into the EPA. In fact, the Fifth Circuit has so found in *Hodgson* v. *Golden Isles Nursing Home, Inc.* (*supra*), wherein it rejected the Secretary's request for a conclusive determination that in all hospitals and nursing homes across the country, aides and orderlies perform equal work.

Assuming, *arguendo,* "administrative necessity" be an appropriate consideration, the fact remains that said factor can duly come into play only *after* a showing is made, as was not done here, that the violations are not isolated but widespread and the result not of negligence but of an intentional policy of discrimination, centrally administered.

CONCLUSION

The writ should be granted.

Respectfully submitted, this 5th day of March, 1974.

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Certificate of Service

I hereby certify that a copy hereof has been furnished to the Office of the Solicitor, United States Department of Labor, Room 441, Main Labor, 14th and Constitution Avenues, N. W., Washington, D. C., by mail, this 5th day of March, 1974.

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